Supreme Court, U.S.
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No. 00-1421

In The

Supreme Court of the United States

ELIZABETH PHELAN,

Petitioner,

v.

THE LARAMIE COUNTY COMMUNITY COLLEGE DISTRICT BOARD OF TRUSTEES, DOCTOR CHARLES BOHLEN, CHERYL W. PORTER, JOHN R. KAISER, LARRY ATWELL, DONALD J. BROWN, TOM BAUMAN, and JEAN VONDRAK BROWN, in their individual capacities,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF IN OPPOSITION

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RESPONDENTS' BRIEF IN OPPOSITION

REASONS FOR DENYING THE WRIT

The question presented by Petitioner's Writ is whether the First Amendment permits, as a part of robust debate, the application of a Code of Ethics to punish an elected member of a college Board of Trustees for speaking against the Board's unanimous view, if such punishment carries no specific collateral injury other than damage to reputation.

The question as presented and phrased is predicated on both a false assumption of fact and an improper interpretation of the Tenth Circuit's ruling based on that assumed fact. Contrary to Petitioner's assertion, nothing in the record establishes Petitioner suffered any injury to her "reputation" as a result of the Board's public censure. Indeed, nothing in the record establishes the Board punished or intended to punish the Petitioner. The Tenth Circuit held that the Board's censure did not trigger First Amendment scrutiny because it did not punish Ms. Phelan for exercising her free speech nor did the censure deter her future speech. *Phelan v. Laramie County Community College Board of Trustees, et al.*, 235 F.3d 1243, 1246 (10th Cir. 2000). The record demonstrates that notwithstanding the Board's censure, or in other words their public statement of displeasure with Petitioner's conduct, which went far beyond simply uttering a view contrary to the unanimous vote, the Board did absolutely nothing to chill the Petitioner's First Amendment rights. Indeed, the record discloses and the Tenth Circuit appropriately noted, "Ms. Phelan has explicitly stated she would

engage in the same actions under similar circumstances in the future." *Id.* at 1247.

Because no one's First Amendment rights were abridged in this case, because Petitioner freely, openly and robustly engaged in public debate on the issues she chose to debate, and because no harm of any kind attended the Board's public statement of displeasure with Petitioner's conduct, this case does not, as Petitioner contends, present "a question of major consequence to the freedom of elected representative officials to publicly dissent from the majority." Thus, the Tenth Circuit's Ruling was proper in all respects and Respondents therefore respectfully urge this Honorable Court to deny the Petition for Writ of Certiorari.

NEITHER THE RECORD NOR THE TENTH CIRCUIT'S DECISION BELOW RAISE A QUESTION OF MERIT FOR THIS COURT'S CONSIDERATION

The salient and undisputed facts of this case are these. Faced with significant repair and renovation needs, the Laramie County Community College Board of Trustees had debated for many months how to finance a campus renewal plan. Finally, on August 19, 1998, the Board, *including Petitioner Phelan,* voted unanimously to present a 5 mill tax assessment to the public for a popular vote. Then, on November 2, 1998, *the day before the vote,* Petitioner Phelan took out an ad in a local newspaper opposing the mill levy. Frustrated by Petitioner's eleventh hour campaign against what she herself had supported until the eleventh hour, the Board voted to censure Petitioner on December 16, 2000 and *asked* her not

to engage in such conduct again. Ms. Phelan was not removed from the Board, nor was she denied any benefits of Board membership. Thereafter, Ms. Phelan filed her lawsuit.

The principal fallacy of Petitioner's Writ is found in Petitioner's representation that she suffered damage to reputation which had a chilling or suppressing effect on her First Amendment right of free speech.

First, the record does not demonstrate any injury whatsoever to Petitioner's reputation, which was that of a "maverick" trustee, nor does the record demonstrate that the Board's censure of the Petitioner had any chilling or suppressing effect on her speech.

> The Board simply made a statement about Ms. Phelan's failure to follow an ethics policy that she voted for on at least three occasions. She remained free to express her views publicly and to criticize the ethics policy and the Board's censure. In fact, Ms. Phelan has explicitly stated she would engage in the same actions under similar circumstances in the future. *Phelan v. Laramie County Community College Board of Trustees, et al.*, 235 F.3d 1243, 1247 (10th Cir. 2000).

Beyond that, even if we assume *arguendo* that Petitioner suffered some damage to her reputation, which is not borne out by the record, Petitioner's First Amendment claim must still fail, since Petitioner's "alleged harm to her reputation" is not enough to establish an abridgement of her First Amendment rights. *Meese v. Keene*, 481 U.S. 465, 472-477 (1987); *New York Times Company v. Sullivan*, 376 U.S. 254, 270, 279-80 (1964).

The irony of this case is that the Petitioner, an elected member of the Board of Trustees of Laramie County Community College, now actively opposing an ethics policy which she herself voted for on three separate occasions, in the name of freedom of expression, filed suit against her fellow Board members and the College *simply* because of a public *statement* of displeasure and nothing more. In other words, Petitioner's suit charges a violation of her right to free speech by the Board's exercise of its own right to free speech; a Constitutionally self-defeating paradox that the Tenth Circuit handled appropriately by affirming the District Court's Summary Judgment.

CONCLUSION

For all the foregoing reasons, Respondents respectfully request this Honorable Court deny the Petition.

Respectfully Submitted,

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